IN THE

Supreme Court of the United States

No. 76-5564

BRINKE TRANSPORTATION CORPORATION
NORMAN CHARLES BRINKE,
Petitioners,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Brinke Transportation Corporation and Norman Charles Brinke (hereinafter sometimes collectively called "Brinke") petition for review on a writ of certiorari of the Order of the United States Court of Appeals for the District of Columbia Circuit in No. 76-1779, entered on September 20, 1976, denying petitioners' application for an interlocutory injunction pending determination of their petition for review of the orders of the Interstate Commerce Commission (Commission) in Docket No. FF-311, ***Brinke Freight Forwarder Application — Petition For Clarification***, and vacating the temporary stay previously granted.

OPINION BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit in No. 76-1779, entered September 20, 1976, is attached hereto as Appendix A. Copies of the Commission's orders of March 30, 1976, and July 13, 1976, that are the subject of the pending petition for review below are attached hereto as Appendices B and C respectively.

JURISDICTION

This application for a writ of certiorari seeking review of the order of the court below denying petitioners' application for an interlocutory injunction pending determination of the petition for review is made pursuant to Title 28, United States Code, Section 2350(a), which provides for application to this Court for the writ within 45 days of the date of the order denying the interlocutory injunction.

STATUTES INVOLVED

Section 2349(b) of Title 28 United States Code provides as follows:

> "The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply."

QUESTION PRESENTED

Did the Court below abuse its discretion in denying, without hearing, petitioners' application for an interlocutory injunction pending review of orders of the Commission which, contrary to the report and orders of the Commission in granting such authority, restrictively in-

terprets the freight forwarder permit issued to petitioner Norman Charles Brinke (and subsequently transferred to Brinke Transportation Corporation) so as to preclude transportation rendered for more than ten years to the irreparable damage of petitioners.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the court below appealing from denial of an interlocutory injunction pending final determination of a petition for review of orders of the Commission which have interpreted the Brinke freight forwarder permit as being restricted exclusively to underlying transportation in rail trailer-on-flatcar (TOFC) service. Enforcement of this order would require that Brinke cease its long-standing and presently predominant method of transportation which is a combination of motor carrier and railroad line-haul service.

The history of this matter spans a period of many years. The application which ultimately culminated in the issuance on December 9, 1974, of freight forwarder permit No. FF-311 to N.C. Brinke was filed on December 6, 1963. At about the same time, because of misleading advice from the Commission's field staff, an application was also filed for a broker's license to provide the same service. The broker's application was unopposed and the license was issued on September 8, 1964, and N.C. Brinke began to operate as a sole proprietorship providing essentially the same service as the successor Brinke Transportation Corporation provides today. This included the use of motor carriers for underlying transportation, and that method of transportation was continued to the present time under both the broker's license and the later issued freight forwarder permit.

In granting the freight forwarder permit the Commission reiterated that Brinke was without "duplicity" and that the operation under the broker's license was conducted under

"color of right". *Brinke Freight Forwarder Application,* 335 I.C.C. 861 (1970), 341 I.C.C. 670 (1972). The Commission's final report and order was later affirmed upon review. *Florida Texas Freight, Inc. v. U.S.,* 373 F. Supp. 479 (D.C. S.D. Fla. 1973) affirmed upon appeal 416 U.S. (1974). The propriety of the prior Brinke broker operation under "color of right" was also independently upheld in *Mercury Motor Express, Inc. et al v. Norman C. Brinke,* 475 F.2d 1086, (CA 5th, 1974).

By a joint petition filed November 5, 1975, two competing freight forwarders, Acme Fast Freight, Inc., and Florida Texas Freight, Inc., sought clarification of the Brinke permit, No. FF-311, contending that the language therein "through the use of trailer on flatcar service of common carriers by railroad" limits Brinke to railroad service exclusively. By order of March 30, 1976 (Appendix B), the Commission found that the "permit in No. FF-311 authorizes the utilization by the holder thereof, for line haul transportation *only* of the trailer-on-flatcar service of common carriers by railroad" and cautioned Brinke to so confine its operations. Brinke's petition for reconsideration was denied by order of July 13, 1976 (Appendix C).

On August 25, 1976, Brinke filed a petition for review of the Commission's orders with the United States District Court for the District of Columbia Circuit, accompanied by a motion for a temporary stay, application for interlocutory injunction, affidavit, memorandum of law, and request for expedited handling. A memorandum in opposition to entry of a stay pending judicial review was thereafter filed by the Commission.

On August 26, 1975, the Court below entered an order granting the motion for temporary stay. The temporary stay was subsequently vacated by the Court's order of September 20, 1976, which likewise denied the application for

interlocutory injunction pending determination of the petition for review (Appendix A).

REASONS FOR GRANTING THE WRIT

A. Petitioners Satisfied the Criteria For Interlocutory Relief.

1. The "Four Factors" for relief.

The jurisdiction of the Court below to enter an interlocutory injunction pending review under §28 U.S.C. 2341 *et seq.* of an order of the Interstate Commerce Commission is established by Section 2349(b) of that title. It provides that a court of appeals may stay or enjoin the enforcement of such order "in a case in which irreparable damage would otherwise result to the petitioner".

The statutory burden upon an applicant of demonstrating irreparable injury has been amplified by recognized criteria for the exercise of the court's discretion to stay an agency order pending judicial review. In its memorandum to the Court below the Commission undertook to address itself to the "four factors" influencing decision upon an application for injunctive relief *pendente lite* recited in *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958), specifically the following:

> "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?"
>
> "(2) Has the petitioner shown that without such relief, it will be irreparably injured?"
>
> "(3) Would the issuance of a stay substantially harm other parties interested in the proceedings?"

> "(4) Where lies the public interest?"

Brinke has not and does not take issue with the stated criteria for interlocutory relief. Indeed, in the memorandum submitted to the Court below in support of such relief Brinke summarized the facts which establish that all "four factors" of the *Virginia Petroleum Jobbers case* are present here. As will be seen the error of the court below stems from its failure to recognize that all four tests for interim relief have been met in this case.

2. Probable success on the merits.

There are two recognized methods of establishing public convenience and necessity as a prerequisite to a grant of operating authority by the Commission — past operations under "color of right" and public testimony of future need for the proposed service. The Brinke forwarder permit was supported by evidence of both types. *Brinke Freight Forwarder Application*, 341 I.C.C. 670, 682 (1972). The past operations conducted by Brinke under the broker's license included traffic moved in part by motor carrier between Jersey City, N.J., and Alexandria, Va., and thereafter by rail to the ultimate destination in Dade County, Florida.

Moreover, Brinke there made it clear that if a freight forwarder permit were substituted for the broker's license it was proposed to continue to substitute truck for rail for a part of the line-haul. The exact nature of the service proposed is clearly recited in the Commission's decision in the following statements:

> "Occasionally, applicant arranges for service by a motor common carrier from Jersey City and other areas to an intermediate ramp such as Alexandria, Va., in partial substitution for the rail haul. Such a partial substitute service expedites shipments and enables the combination of two loaded

semitrailers from different origins. Northbound, the process is the reverse."

"Applicant expresses a willingness to surrender his broker's license for cancellation concurrently with issuance of the authority here sought provided the freight forwarder authority granted will enable him to provide complete service for Dade County shippers to and from the 14 States involved."

"Further he [Brinke] argues

. . . that the Commission should properly conclude that a grant of the sought authority embraces partial substituted motor carrier service in conjunction with rail TOFC service". 341 I.C.C. at 675-680.

Once protestants are apprised of the "operation proposed", as here, *the burden is upon them*, as the Commission stated in its earlier report, to take appropriate steps to suggest operating restrictions to protect their interests (335 I.C.C. 860 at 870-71). No such restrictions were sought by protestants. The Commission likewise stated in that earlier report that generally "as a matter of policy" it does not impose restrictions upon grants of freight forwarder authority, that even agreed restrictions will not be accepted unless necessary in the public interest, and that the Commission will not on its own motion impose a restriction unless it will serve some statutory or useful purpose. (335 I.C.C. at 870-71).

Thus, the prior report in this very case makes it abundantly clear that operating rights restrictions are not favored, that they cannot be implied, and that before a freight forwarder restriction is imposed it must be shown to be necessary and in the public interest. It necessarily

follows that the Commission departed from its own standards if, as it later held, it granted Brinke something less than was sought, without a single word in the report to establish that such was the Commission's intention.

The Commission's memorandum in opposition to interlocutory relief below, therefore, rests completely upon a faulty premise in emphasizing the *right* of the Commission to restrict a grant of operating authority. In this regard the Commission urged in its memorandum that "the Commission may, as it did here, place conditions upon its grant of authority." Brinke fully concedes that it *may* do so but the Commission cannot point to one word in the reports or orders in the application case to show that it in fact imposed a condition that precluded continued partial use of underlying motor carrier service as proposed by Brinke. If, in fact, as claimed, the Commission did not authorize Brinke to perform the service proposed, including partial use of trucks, as fully described in the report, the Commission was obliged to so state. It properly cannot, contrary to its stated policies regarding operating restrictions, later imply a restriction that was not affirmatively found to be desirable in the public interest — or even discussed.

The orders of the Commission under review affirmatively establish that the restriction against partial use of trucks was implied. In support of its application Brinke showed past operations using trucks in part and proposed similar service as a forwarder in the future. But rail TOFC service was used in part or whole for every movement. Hence, Brinke has been operating "through the use of" rail service. Admittedly he has not been operating "only" through the use of rail service, but, until it undertook to "clarify" his permit the Commission never required that the operation be so restricted. If the Commission cannot "interpret" a permit other than by implying a word, here the word "only", that does not appear in the permit, the language

must be ambiguous requiring resort to the record in the application case.

The significance of the language used in the permit is further established by an interim conscious and express modification of the restrictive clause by the Commission itself. Throughout the entire lengthy history of favorable reports and inadvertently issued permits to Brinke, the present language was used with one notable exception. In the unprinted order that accompanied the final 1972 printed decision the "Service Authorized" was made subject to the following proviso: "restricted to the use of the trailer-on-flatcar services of common carrier by railroad". When it was pointed out by Brinke informally that this revised language could logically be interpreted to preclude the proposed use of motor carrier service, the Commission in issuing the present permit, restored the original recommended language "through the use of" rail TOFC service. If the latter meant "only" rail service or "restricted to" rail service, there was obviously no purpose to the Commission's restoration of the previous phrasing of the permit.

3. Irreparable injury to petitioners.

The affidavit of N.C. Brinke submitted in support of an interim stay makes clear the fact that his freight forwarder operation has come to rely more and more upon alternative motor carrier service in substitution for a portion of the rail service, reflecting a determined effort to offset the increasingly poor service of the railroads. Operating under acknowledged "color of right" of his 1965 broker's license, Brinke began using trucks in conjunction with rail TOFC service about ten years ago. This partial substituted service became increasingly important in the Jersey City-Hialeah move in the leg between Jersey City and Potomac Yard, Alexandria, Va., as the service of the problem bankrupt Eastern lines went from bad to worse.

Speed of delivery is a major, and for some shippers the most compelling consideration in selecting a carrier or forwarder. Because of the average of three days' additional transit time when all-rail service is employed as the underlying mode of transportation, as contrasted to the speedier truck-rail movement, Brinke will inevitably lose traffic to competing forwarders whose permits enable them to use any method of transportation, including the faster truck service for the entire line-haul. If Brinke is tied to an average eight days' elapsed time for rail service between Jersey City and Hialeah, whereas motor carrier competitors and other forwarders, unrestricted in their election of underlying transportation, can opt for all-motor carrier movement, and offer third and fourth morning service, obviously the many shippers and receivers now using Brinke who consider expedited service to be of major significance will select one of its competitors for future shipments. Even should petitioners ultimately prevail on the merits in this case there is no way that these lost revenues can be recouped.

By the Commission's order of March 30, 1976, Brinke is "advised and cautioned to confine its operations" to rail T.O.F.C. service exclusively. Compliance with this admonition, which, of course, can be enforced by a cease and desist order, has and will result in irreparable injury to Brinke.

4. Possibility of injury to other interested parties

Petitioner, Brinke Transportation Corporation, as the successor in interest to N.C. Brinke, seeks to preclude the Commission, *pendente lite*, from compelling it to change a method of operation employed by the latter with the full *knowledge and acquiescence of the Commission* since 1964 or 1965. Such a change will cause the former to lose business to competitors who are not limited to using deteriorating rail service but are free to use speedier motor

carrier service for the entire haul if they so desire. Clearly, therefore, these competitors would *benefit* from denial of relief *pendente lite*. Equally clearly, they can in no way be injured by preservation of the *status quo*. Brinke simply seeks to continue to serve its customers in the way it has served them in the past, by substituting motor carrier service for those portions of the line-haul transportation where rail service is grossly inferior.

5. The public interest.

As previously noted the public interest is also a relevant consideration when equitable relief is requested. *Yakus v. United States*, 321 U.S. 414 (1944). Here the public interest is definitely aligned with petitioners. N.C. Brinke, in his supporting affidavit has shown that speedier service and increased equipment availability is made possible when motor carrier service is substituted for a portion of the rail haul on some movements, notably from and to Jersey City. This enables Brinke to provide service approaching that of its competitors.

At the same time Brinke has consistently published rates that are lower than those of such competitors. Clearly, the public is well served when it receives good service at a lower cost than would otherwise be available.[1] But if Brinke is now forced to rely "only" upon rail service, its customers must choose between two equally unpalatable alternatives — slower service with Brinke or faster service but higher rates with another forwarder or carrier. It necessarily follows that, on balance, the public interest will be advanced by entry of the interlocutory injunction sought by petitioners.

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[1] See Report and Order of the Commission, dated September 20, 1974, in I&S Docket No. 8911, *Freight Forwarder Class Rates Between Fla. & Various States*, in which the Brinke rate level was prescribed by the Commission.

Indeed, it should be added that the relief sought by Brinke is in furtherance of the Commission's statutory responsibilities and should properly have been supported rather than opposed by that agency. The National Transportation Policy (49 U.S.C. preceding Sec. 1) calls upon the Commission to "promote . . . . efficient service" and "to encourage . . . . reasonable charges for transportation services". The result of the "clarification" of the Brinke permit, however, is to require that Brinke provide less efficient service and be limited to possibly more costly rail service, by being deprived of the option to use motor carriers for a part of the movement. Thus, the Commission has acted squarely to the detriment of the public good in restrictively "clarifying" the Brinke permit.

B. The Court Below Abused Its Discretion in Denying, Without Hearing, The Application For Interlocutory Injunction.

As previously stated the application for interlocutory injunction to restrain enforcement of the Commission's orders pending judicial review was made under Section 2349(b) of Title 28 of the United States Code. Frequent reference is made in that section to a "hearing" on the application. In this instance, however, there was no hearing before the Court which acted upon the basis of the application and the opposing memorandum of the Commission. Had there been a hearing petitioners would have been afforded an opportunity to demonstrate the fallacy of the Commission's argument that it earlier consciously imposed a restriction in the Brinke freight forwarder permit consistent with its later interpretation of that permit.

Recognizing that the jurisdiction of the court of appeals in this instance is discretionary, it is submitted that where the statutory standard of irreparable injury and other judicial

criteria for the exercise of the court's discretion have been satisfied, an interlocutory injunction should properly issue. The contrary order of the Court below should be held, therefore, to constitute an improvident exercise of judicial discretion warranting reversal by this Court. *Railway Exp. Agency, Inc. v. U.S.*, 82 S. Ct. 466, 7 L. Ed 2d 432 (1962); *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (Scrap)* 93 S CT 409 U.S. 1207, 34 L. Ed. 2d 21 (1972).

WHEREFORE, petitioners Brinke Transportation Corporation and Norman Charles Brinke pray that this Honorable Court grant the petition for writ of certiorari and upon review enter an order directing that the application for interlocutory injunction pending determination of the petition for review be granted by the court below.

Respectfully submitted,

J. RAYMOND CLARK, ESQ.
Attorney for Petitioners
Brinke Transportation Corporation
and Norman Charles Brinke

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1779

September Term, 1976
Filed Sep. 20, 1976
George A. Fisher
Clerk

Brinke Transportation Corporation, et al.,
Petitioners

v.

The Interstate Commerce Commission and United States of America,
Respondents

BEFORE: Bazelon, Chief Judge; Robinson, Circuit Judge.

ORDER

On consideration of petitioners' application for interlocutory injunction pending determination of petition for review, for expedited action thereon, and of respondents' opposition thereto, it is

ORDERED by the Court that petitioners' aforesaid application for interlocuatory injunction pending determination of petition for review is denied, and, it is

FURTHER ORDERED by the Court that the temporary stay granted by order filed August 26, 1976 is hereby vacated.

Per Curiam

APPENDIX B

ORDER

Service Date
Apr 7, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 30th day of March, 1976.

No. FF-311

BRINKE FREIGHT FORWARDER APPLICATION— PETITION FOR CLARIFICATION

It appearing. That Norman Charles Brinke, doing business as N.C. Brinke, of Homestead, Fla., holds a permit in No. FF-311, dated December 9, 1974, authorizing him to operate in interstate commerce, as a freight forwarder of general commodities, between points in Dade County, Fla., on the one hand, and on the other, points in Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas, *through the use of trailer-on-flatcar service of common carriers by railroad* (emphasis added):

It further appearing. That by petition jointly filed November 5, 1975, Acme Fast Freight, Inc., and Florida-Texas Freight, Inc., seek clarification of the above-described permit; that they contend (a) that the language "through the use of trailer-on-flatcar service of common carriers by railroad" requires that Brinke utilize *only* rail trailer-on-flatcar (TOFC) service for line-haul transportation, (b) that the utilization by Brinke of motor common carriers other than in exempt operations within terminal areas pursuant to Section 202(c)(2) of the Interstate Commerce Act is unlawful, and (c) that Brinke should be admonished not to utilize the services of motor common carriers or to file statements in support of motor common carrier applications;

It further appearing. That on November 19, 1975, Brinke filed a reply to the said petition in which he contends (a) that, while the quoted restriction requires that he use rail TOFC service on every shipment, it in no sense requires that he use *only* rail TOFC service as underlying transportation for the entire movement, (b) that there is no single shipment handled by Brinke that has not moved, usually in whole but in every case in part, in rail line-haul TOFC service, and (c) that he is in full compliance with the terms of his permit;

It further appearing. That, as both petitioners and Brinke contend, there is no ambiguity in the language of the permit as issued and, thus, it is neither necessary nor proper for us to examine the record which formed the basis for its issuance in order to determine what authority was granted, *Morehouse- Investigation of Operations,* 81 M.C.C. 614, 616 (1959); that the language of the permit clearly restricts Brinke to the use of the TOFC service of common carriers by railroad for line-haul transportation; that the interpretation advanced by Brinke would allow for the utilization by Brinke of common carriers by motor vehicle or water as well as express companies and air carriers and all other carriers specified in Section 418 of the Act so long as rail TOFC service was utilized for some portion of each movement; that such is a strained interpretation which runs counter to the clear language of the considered restriction and renders it practically meaningless; and that Brinke should be advised that he may not utilize, pursuant to the considered permit, line-haul service other than the TOFC service of rail common carriers;

Wherefore, and good cause appearing therefor:

We find. That the above-described permit in No. FF-311 authorizes the utilization by the holder thereof, for line-haul transportation, *only* of the trailer-on-flatcar service of common carriers by railroad.

It is ordered. That N.C. Brinke be, and is hereby, advised and cautioned to confine its operations to those authorized by its permit as clarified hereinabove.

It is further ordered. That, except to the extent granted herein, the petition for clarification be, and it is hereby, denied without prejudice to the filing by petitioners of an appropriate complaint.

By the Commission, division 1.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX C

ORDER

Service Date
July 21, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 13th day of July, 1976.

No. FF-311

BRINKE FREIGHT FORWARDER APPLICATION— PETITION FOR CLARIFICATION

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of N.C. Brinke, permit holder, filed May 4, 1976, for reconsideration of the order of March 30, 1976, clarifying the language of its permit;

(2) Joint reply by Acme Fast Freight, Inc., and Florida-Texas Freight, Inc., petitioners, filed June 6, 1976;

and good cause appearing therefor:

It is ordered. That the petition be, and it is hereby, denied, for the reasons that (1) the order of March 30, 1976, was entered in accordance with applicable law, and (2) no sufficient or proper cause appears for reconsidering the said order.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Murphy, Gresham, and Christian.

ROBERT L. OSWALD,
Secretary.

(SEAL)
